

FILED MAY 27 2008 USDC-ORE

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

WESTERN SURETY COMPANY, a  
South Dakota corporation,

Civ. No. 07-1372-AA

OPINION AND ORDER

Plaintiff,

v.

L.H. MORRIS ELECTRIC, INC., an  
Oregon corporation, KPD  
INSURANCE, an Oregon corporation,  
JAMES W. AND LINDA S. MITCHEM,  
individuals, TIMOTHY L. MITCHEM,  
an individual, ANNIE JANIE  
CANTU, an individual, and JERRY  
BALDING, an individual,

Defendants.

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AIKEN, Judge:

Plaintiff Western Surety Company filed suit alleging breach of contract, indemnity, fraud, negligent hiring and supervision, breach of fiduciary duty and negligence. Plaintiff's claims arise from the issuance of construction bonds by plaintiff on behalf of

defendant L.H. Morris Electric. Plaintiff now moves for partial summary judgment against defendant Timothy Mitchem with respect to its claims of contractual indemnity and breach of contract. The motion is denied.

Plaintiff maintains that in connection with the issuance of construction bonds to defendant L.H. Morris Electric, Timothy Mitchem, who was allegedly a principal of the corporation, agreed to indemnify plaintiff for any costs and other expenses associated with those bonds. Plaintiff seeks a ruling that Timothy Mitchem is obligated to indemnify plaintiff and pay the bond premium, has breached his obligation by failing to do so, and is liable to plaintiff for damages.

Plaintiff relies on a General Indemnity Agreement in favor of plaintiff that Timothy Mitchem signed on May 27, 2003 as a principal of L.H. Morris Electric. See Affidavit of Douglas Mraz, Ex. A. However, in his Answer to the Amended Complaint, Timothy Mitchem asserts that in November 2005, he transferred and assigned his interest in L.H. Morris Electric and did not sign a subsequent indemnity agreement on behalf of the corporation. Answer to Amended Complaint, ¶¶ 13, 14, 19, 20, Ex. A. Further, the record reflects that on September 27, 2006, James and Linda Mitchem, not Timothy Mitchem, signed a second General Indemnity Agreement - identical to the first - in favor of plaintiff. Complaint, Ex. C. Finally, Timothy Mitchem did not sign any of the Subcontractor

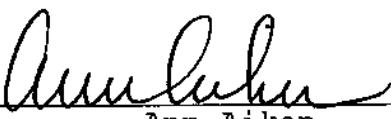
Performance and Labor and Material Bonds at issue in this litigation on behalf or as principal for L.H. Morris Electric. Mraz Aff., Exs. B, C.

Even though Timothy Mitchem has not responded to plaintiff's motion, I find that genuine issues of material fact exist as to whether the second General Indemnity Agreement superseded the first and whether Timothy Mitchem is obligated to indemnify plaintiff. See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

Accordingly, plaintiff's motion for partial summary judgment against defendant Timothy Mitchem (doc. 21) is DENIED.

IT IS SO ORDERED.

Dated this 22 day of May, 2008.

  
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Ann Aiken  
United States District Judge